NO. 12-14-00337-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

LARRY MICHAEL MAPLES, APPELLANT	***§***	***APPEAL FROM THE 294TH***
V.	***§***	***JUDICIAL DISTRICT COURT***
THE STATE OF TEXAS, APPELLEE	***§***	***VAN ZANDT COUNTY, TEXAS***

MEMORANDUM OPINION

Larry Michael Maples appeals his conviction for capital murder, for which he was sentenced to life imprisonment without the possibility of parole. In two issues, Appellant contends the evidence is insufficient to support the jury's verdict. In a third issue, Appellant argues that the State violated his due process rights by knowingly presenting perjured testimony. We affirm.

BACKGROUND

During the early morning hours of March 23, 2013, Appellant drove to Moises Clemente's residence, which was located in a rural location outside Canton, Texas. He parked his vehicle three-tenths of a mile away from the residence and walked the remainder of the way carrying a Colt .45 semi-automatic handgun. He entered the residence and found his wife, Heather Maples, in a bedroom with Clemente. Appellant immediately shot Clemente once in the abdomen and shot Heather several times, with the fatal shot being fired after Appellant placed a pillow over Heather's head as she lay on the floor. Afterwards, while still at Clemente's home, Appellant made several calls from his cell phone. In the calls, he admitted shooting both Clemente and Heather and stated that Heather was dead. Appellant waited at the residence until police arrived and told the investigating officer what he had done.

Appellant was charged by indictment with capital murder. More particularly, the State alleged in the indictment that Appellant intentionally caused the death of Heather Maples while in the course of committing the offense of burglary of a habitation. Initially, the State filed a notice of intent to seek the death penalty, but withdrew the notice before the case went to trial. Appellant pleaded "not guilty," and the jury found him "guilty" as charged in the indictment. The trial court sentenced Appellant to the mandatory punishment of imprisonment for life without the possibility of parole.[1] This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In his first issue, Appellant asserts the evidence is insufficient to support his conviction for the offense of capital murder. In his second issue, Appellant asserts the trial court erred in denying his motion for directed verdict. A challenge to a trial court's ruling on a motion for directed verdict is a challenge to the sufficiency of the evidence to support a conviction, and they are reviewed under the same standards. ***Williams v. State***, 937 S.W.2d 479, 482 (Tex. Crim. App. 1996). Accordingly, we will address Appellant's first and second issues together.

Standard of Review

When sufficiency of the evidence is challenged on appeal, we view all of the evidence in the light most favorable to the verdict to decide whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *See* ***Jackson v. Virginia***, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1970); ***Brooks v. State***, 323 S.W.3d 893, 895 (Tex. Crim. App. 2010). Under this standard, the jury is the sole judge of the witnesses' credibility and the weight of their testimony. ***Jackson***, 443 U.S. at 319, 99 S. Ct. at 2789; ***Brooks***, 323 S.W.3d at 899. We defer to the trier of fact's responsibility to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences from the basic facts to ultimate facts. ***Hooper v. State***, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007). Each fact need not point directly and independently to the guilt of the appellant, as long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. ***Id***. A trial judge who is not the finder of fact on the issue of guilt can direct a verdict in the defendant's favor only if, after viewing the evidence in the light most favorable to the prosecution, she cannot conclude

[1] *See* TEX. PENAL CODE ANN. § 12.31(a)(2) (West Supp. 2015) (capital murder punishable by imprisonment for life without parole or by death).

that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***York v. State***, 342 S.W.3d 528, 544 (Tex. Crim. App. 2011).

In determining whether the state has met its burden of proving the defendant guilty beyond a reasonable doubt, we compare the elements of the crime as defined by a hypothetically correct jury charge to the evidence adduced at trial. ***Thomas v. State***, 444 S.W.3d 4, 8 (Tex. Crim. App. 2014). A hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the state's burden or restrict its theories of liability, and adequately describes the particular offense for which the defendant was tried. ***Malik v. State***, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Applicable Law

In relevant part, a person commits murder if he intentionally causes the death of an individual. *See* TEX. PENAL CODE ANN. § 19.02(b)(1) (West 2011). The offense of capital murder, based on the allegations in the indictment in this case, requires proof that the person intentionally committed the murder while in the course of committing or attempting to commit burglary. *See* TEX. PENAL CODE ANN. § 19.03(a)(2) (West Supp. 2015).

A person commits the offense of burglary if, without the effective consent of the owner, he enters a habitation and commits or attempts to commit a felony, theft, or an assault. TEX. PENAL CODE ANN. § 30.02(a)(3) (West 2011). Under Section 30.02(a)(3), the State was not required to prove that Appellant entered Clemente's residence with the specific intent to commit burglary at the moment of entry. ***Rivera v. State***, 808 S.W.2d 80, 92 (Tex. Crim. App. 1991). Rather, in a capital murder prosecution, the murder of the victim satisfies not only the murder requirement for capital murder, but also the underlying felony requirement to support burglary. *See* ***Gardner v. State***, 306 S.W.3d 274, 287 (Tex. Crim. App. 2009) ("In a prosecution for capital murder based on burglary, the requirement that a felony be intended is satisfied by the murder of the victim."); ***Homan v. State***, 19 S.W.3d 847, 848 (Tex. Crim. App. 2000) (reversing court of appeals' holding that murder of complainant could not be used to turn entry into home a burglary); ***Matamoros v. State***, 901 S.W.2d 470, 474 (Tex. Crim. App. 1995) (holding evidence was sufficient to prove burglary component of capital murder where defendant entered complainant's home without his consent and killed complainant).

Forced entry is not an element of burglary; rather, burglary requires the entry to be made without the effective consent of the owner. *See* TEX. PENAL CODE ANN. § 30.02; ***Ellett v. State,***

607 S.W.2d 545, 549 (Tex. Crim. App. [Panel Op.] 1980); *see also* ***Evans v. State***, 677 S.W.2d 814, 818 (Tex. App.—Fort Worth 1984, no pet.) ("A person can make an unlawful entry by walking through an open door when the entry is without the owner's consent."). Moreover, lack of consent to entry in burglary prosecutions may be shown by circumstantial evidence. ***Hathorn v. State***, 848 S.W.2d 101, 107 (Tex. Crim. App. 1992).

Discussion

As charged in the indictment, the State was required to show that Appellant intentionally caused the death of Heather Maples by shooting her with a firearm while in the course of committing the offense of burglary of a habitation of the owner, Moises Clemente. *See* TEX. PENAL CODE ANN. § 19.03(a)(2). Appellant does not contest that he entered Clemente's habitation or that, after doing so, he shot and killed Heather Maples. Accordingly, he concedes the evidence supports a conviction for murder. Appellant contends, however, that the evidence is insufficient to prove he killed his wife during the course of a burglary. Since the murder of the victim supplies the requirement that a felony be committed to support burglary, the only question for our determination is whether the evidence is sufficient to prove that Appellant did not have Clemente's consent to enter his residence. *See* ***Gardner v. State***, 306 S.W.3d at 287; ***Homan***, 19 S.W.3d at 848; ***Matamoros***, 901 S.W.2d at 474. Therefore, we limit our analysis to that element. *See* TEX. R. APP. P. 47.1.

The focus of Appellant's insufficiency argument is an attack on the credibility of Moises Clemente. He points out that Clemente testified he and Heather Maples had not engaged in intimate contact on the night in question when forensic evidence showed otherwise. Appellant states that this establishes Clemente committed perjury. Appellant appears to argue that because Clemente was untruthful about whether he and Heather had engaged in sexual activity before Appellant's arrival, the jury's reliance on his testimony as a whole was unreasonable or irrational. Thus, he insists that his conviction should not be upheld. We disagree.

As stated above, our analysis is limited to the sufficiency of the evidence that Appellant entered Clemente's residence without his consent on the night in question. To that end, the evidence shows that Appellant and Heather Maples were having marital difficulties and she asked Appellant to move out of their home. Heather had a prior long-term relationship with Clemente, and Appellant suspected that she and Clemente had begun having an affair. Earlier that day, family members observed that Appellant was withdrawn and not interacting normally

with them. In the early evening, an acquaintance of Appellant who was an ordained minister believed that Appellant was emotionally disturbed. Appellant returned to his parents' home and was last seen by his sister in his bedroom before she went to sleep.

That night, without notifying anyone, Appellant left his parents' home to look for Heather. When he did not find her at their home, he drove to Clemente's home with a handgun in his possession. Appellant parked his vehicle three-tenths of a mile from Clemente's residence and walked the remainder of the way to the house. The entrance to Clemente's property had a mechanical gate, which could be opened only after entering the access code. But because Appellant was not in a vehicle, he was able to enter Clemente's property.[2] Upon arriving at Clemente's house, he entered the residence through an unlocked door. When he found Heather and Clemente in a bedroom, he shot Clemente once in the abdomen while he was in the bed and ultimately shot Heather at least four times.

Appellant called 911 from Clemente's residence and told the 911 dispatcher that he had gone to the home of his wife's boyfriend, shot him in the belly, shot his wife a "bunch of times," and his wife was not breathing. A recording of the 911 call was played to the jury. In the background of the 911 tape, Clemente's voice can be heard giving Appellant the physical address of the residence to give to law enforcement, as well as the code to enter the mechanical gate upon arriving.

The evidence reflects that Appellant was upset that Heather wanted a divorce and asked that he move out of their house. Appellant's demeanor earlier in the day shows that he was consumed with the thought that Heather had resumed a relationship with Clemente, and witnesses observed that he seemed emotionally disturbed early in the evening. The jury could reasonably conclude that Appellant left his family's home in the middle of the night with a large caliber handgun in his possession to look for Heather with a plan to find and confront her.

Although Appellant's father specifically told him not to go to Clemente's home, Appellant did so under the cover of darkness and parked his vehicle far enough away so that his arrival would not be detected. After parking, Appellant walked across Clemente's property

[2] Appellant did not testify, and there is no direct testimony about how Appellant entered the property. But Clemente testified that the property was a 125 acre ranch that was fenced and gated. He believed that the driveway from the gate to his home was approximately 1,500 feet. During the 911 call, the dispatcher informed Appellant that law enforcement officers were at the gate and needed the code to enter the property. Appellant did not know the code, but Clemente can be heard providing it. Based on these facts, it was reasonable to infer that the gate was closed when Appellant approached the property, and that he entered it by traversing the gate or the fence.

towards his home, presumably expecting to find Heather there. Upon arrival, Appellant would have been able to see Heather's vehicle parked at Clemente's residence and surmise that she was inside with Clemente. Because Clemente and Heather were shot in a bedroom, it was logical for the jury to assume Appellant entered the residence undetected through an unlocked door without knocking or otherwise putting the occupants on notice of his presence. Similarly, the jury could infer from this evidence that Appellant planned to surprise, confront, and injure Heather and Clemente. Finally, the jury could reasonably conclude from this evidence that Appellant entered Clemente's property and his home without Clemente's permission or effective consent. Accordingly, the evidence is sufficient to support the jury's finding that Appellant did not have Clemente's consent to enter his residence, and the trial court did not err in denying Appellant's motion for directed verdict.

Appellant's first and second issues are overruled.

DUE PROCESS

In his third issue, Appellant argues that the State knowingly presented perjured testimony through Moises Clemente in violation of his due process rights.[3]

Standard of Review and Applicable Law

A defendant is denied his right to due process when his conviction is obtained through the State's knowing use of false evidence. *See* ***Napue v. People of State of Ill.***, 360 U.S. 264, 269, 79 S. Ct. 1173, 1177, 3 L. Ed. 2d 1217 (1959); ***Ex parte Castellano***, 863 S.W.2d 476, 481 (Tex. Crim. App. 1993) (holding state violates defendant's due process rights when it actively or passively uses perjured testimony to obtain conviction). A due process violation may arise not only through false testimony specifically elicited by the state, but also by the state's failure to correct testimony it knows to be false. ***Ex parte Ghahremani***, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). The testimony need not necessarily be perjured to constitute a due process violation; rather it is sufficient that the testimony was false. ***Ex parte Chavez***, 371 S.W.3d 200,

[3] The third issue specifically set forth by Appellant in his brief is that the trial court erred by refusing to include a requested instruction regarding perjury. However, Appellant does not cite to authorities or the record, or otherwise provide analysis pertaining to the stated issue. Therefore, we decline to address the stated issue because it is inadequately briefed. *See* TEX. R. APP. P. 38.1(*i*); ***Bell v. State***, 90 S.W. 3d 301, 305 (Tex .Crim. App. 2002). However, we will address Appellant's denial of due process claim because the substance of the argument contained in the brief addresses a constitutionally protected right and an appellate court must construe an appellant's brief liberally and review issues that are fairly included within a particular issue or point. *See* TEX. R. APP. P. 38.1(f); ***Ramsey v. State***, 249 S.W.3d 568, 581 n.5 (Tex. App.—Waco 2008, no pet.).

208 (Tex. Crim. App. 2012). That is because a false evidence due process claim is not aimed at preventing the crime of perjury, which is punishable in its own right, but is designed to ensure that the defendant is convicted and sentenced on truthful testimony. ***Id***. at 211.

However, only the use of *material* false testimony amounts to a due process violation. ***Id.*** at 208. False testimony is material only if there is a "reasonable likelihood" that it affected the judgment of the jury. ***Ghahremani***, 332 S.W.3d at 477. "Whether the perjured testimony harmed the defendant can be quantitatively assessed by examining the remaining evidence at trial and the effect of the perjured testimony upon that evidence." ***Ex parte Fierro***, 934 S.W.2d 370, 373 (Tex. Crim. App. 1996). Because the materiality standard for the state's knowing use of perjured testimony is identical to the constitutional harmless error standard, an analysis under the materiality standard obviates the need to conduct a separate harmless error analysis on direct appeal. *See* ***id.***; *see also* ***Ramirez v. State***, 96 S.W.3d 386, 396 (Tex. App.—Austin 2002, pet. ref'd) (noting that materiality standard in reviewing state's knowing use of perjured testimony "is essentially the harmless error standard for constitutional error embodied in the Texas Rules of Appellate Procedure 44.2(a)").

When confronted with constitutional error, a reviewing court must reverse the judgment unless it can conclude that the error did not contribute to the defendant's conviction or punishment beyond a reasonable doubt. TEX. R. APP. P. 44.2(a). Our primary question is whether there is a "reasonable possibility" that the error might have contributed to the conviction. ***Mosley v. State***, 983 S.W.2d 249, 259 (Tex. Crim. App. 1998) (op. on reh'g). We must calculate, as much as possible, the probable impact of the evidence on the jury in light of the existence of other evidence. ***Wesbrook v. State***, 29 S.W.3d 103, 119 (Tex. Crim. App. 2000). We take into account the entire record, and if applicable, we may consider the nature of the error, the extent that it was emphasized by the state, its probable collateral implications, and the weight a juror would probably place on the error. ***Snowden v. State***, 353 S.W.3d 815, 822 (Tex. Crim. App. 2011). This requires us to evaluate the record in a neutral, impartial, and even-handed manner and not in the light most favorable to the prosecution. ***Harris v. State***, 790 S.W.2d 568, 586 (Tex. Crim. App. 1989), *disagreed with in part on other grounds by* ***Snowden***, 353 S.W.3d at 821–22.

Discussion

Reurging his earlier argument attacking Clemente's credibility, Appellant contends the forensic evidence established that Clemente committed perjury when he denied that he had engaged in intimate contact with Heather shortly before Appellant shot them. He contends further that the State knew this denial was not true when Clemente made it under oath in front of the jury. Appellant's argument continues that the State's knowing presentation of Clemente's perjured testimony on this subject, without taking any action to correct the false statement, is a due process violation that requires reversal of his conviction.

In addressing this issue, we will assume, without deciding, that the State knew Clemente testified falsely when he denied that he and Heather had recently engaged in intimate contact. Therefore, our analysis will focus on the materiality element.

Before trial, the State disclosed and produced the forensic reports to Appellant's counsel indicating Clemente and Heather had recently engaged in intimate contact. Appellant called the DPS technician who analyzed the DNA evidence as a witness at trial. Thus, the jury was aware that Clemente's denial that he and Heather had not engaged in intimate contact was inconsistent with the forensic evidence. However, the jury, as the trier of fact, is the sole judge of the credibility of the witnesses and of the strength of the evidence. ***Fuentes v. State***, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. ***Sharp v. State***, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). The jury was entitled to disbelieve Clemente's denial of engaging in intimate contact with Heather and believe his testimony on other matters.

Additionally, when viewed in a neutral light after disregarding Clemente's denial, the remaining evidence shows that Appellant went to Clemente's residence and entered without Clemente's effective consent. The physical evidence shows that Appellant confronted Heather and Clemente while they were in the bedroom and shot Clemente while he was still in his bed. The evidence shows further that Appellant sought, found, and killed Heather in a cold and calculated manner. When Appellant called his father after shooting Clemente and Heather, he stated that "I did what y'all told me not to do." When asked what he did, Appellant answered that he "shot Mo [Moises Clemente] and killed Heather." At his father's direction, Appellant called 911 and told the 911 dispatcher he had gone to his wife's boyfriend's home where he shot the boyfriend in the belly, shot his wife a "bunch of times," and his wife was not breathing.

Appellant told the 911 dispatcher that Heather had asked for a divorce and he knew by looking at her phone and text messages that she had been seeing Clemente. He told the dispatcher that Heather had been with "this guy" all day, it "ate him up," and he was "sick of it." Appellant later told Ranger Brent Davis that he went to Clemente's house looking for Heather and that he took the handgun with him as he was looking for her. The cumulative force of this evidence, including Appellant's own admissions, overwhelmingly supports the jury's verdict beyond a reasonable doubt.

Moreover, Clemente's denial that he and Heather had recently engaged in intimate conduct was not relevant to any element of the offense. Nor can we identify any probable collateral implications Clemente's denial might have had.

Based upon our review of the record and our consideration of the relevant factors, we conclude that the jury did not place any weight on Clemente's testimony concerning whether he and Heather had recently engaged in intimate contact. Therefore, there was not a "reasonable likelihood" that such testimony affected the judgment of the jury. Accordingly, we hold that the testimony was not material.

Appellant's third issue is overruled.

DISPOSITION

Having overruled Appellant's three issues, we ***affirm*** the judgment of the trial court.

GREG NEELEY
Justice

Opinion delivered June 24, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(DO NOT PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

JUNE 24, 2016

NO. 12-14-00337-CR

LARRY MICHAEL MAPLES,
Appellant
V.
THE STATE OF TEXAS,
Appellee

Appeal from the 294th District Court
of Van Zandt County, Texas (Tr.Ct.No. CR13-00334)

THIS CAUSE came to be heard on the appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Greg Neeley, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.